IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 398 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHIKBHIBEN RAQTILAL JOSHI

Versus

KANTILAL PUNJABHAI PARMAR

Appearance:

MR SAMIR BUNDELA for MR PM RAVAL for Petitioner

MS ARCHANA ACHARYA for MR DK ACHARYA for Respondent No. 1

MR ST MEHTA, ADDL. PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 28/07/2000

CAV JUDGEMENT

This is a Criminal Revision Application filed under Section 401 of the Criminal Procedure Code, 1973,

(for short, "Cr.P.C.") filed by original complainant Bhikhiben Ratilal Joshi (victim) in Criminal Case No.1641 of 1984, challenging the legality, correctness and propriety of the order dated 18.2.1988 passed by the learned Joint District Judge and Additional Sessions Judge, Banaskantha at Palanpur, (for short, "the learned Appellate Judge") by rendering his Judgment Exh.7 dated 18.02.1988 in Criminal Appeal No.30 of 1985 by which he was pleased to reverse the judgment Exh.30 of conviction and sentence dated 20.07.1985 rendered by the learned Judicial Magistrate First Class, Deesa, (who will be referred to hereinafter as "the learned Magistrate") in Criminal Case No.1641 of 1984, which was pending on his file.

The revision-petitioner was the complainant while the revision opponent no.1-Kantilal Punjabhai Parmar was accused in Criminal Case No.1641 of 1984 and therefore parties will be referred to hereinafter as the complainant and accused for the sake of convenience.

2 The facts leading to this Criminal Revision Application in a nutshell are as follows:-

2.1 As per the complaint lodged by the original complainant-Bhikhiben Ratilal Joshi, she is serving as a teacher in primary school of village Rampura, since about six months before the date of her complaint. Accused Kantilal Parmar is a Head Master seving in same school in which the complainant is serving. Except the complainant and accused, other five teachers are also serving in the said school. The ccomplainant is the junior-most teacher in the said school.

2.2 On or about 7th July 1984, at about 6.30 AM the complainant had gone to school to perform her duties. That day of 7th July 1984, was a day for disbursement of pay for the month of June 1984. On that day, pay was being disbursed to the teachers in the room of school and that work relating to disbursement of the pay was being done by the accused. Therefore, the complainant went to the room of the accused to collect her pay. Accused asked the complainant to collect her pay after school work-hours were over and therefore the complainant went to class room of Standard-I. After the school work hours were over, she went to room of accused at about 10.20 AM and reuested the accused to hand over her pay. Thereupon accused asked the complainant to wait till other male and female teachers leave the school. The complainant therefore went to chowk of the school and was standing there waiting for call of the accused to collect the pay.

It is the case of the complainant that after all the teachers of the school left the school, the accused who was Head Master of the school called the complainant in the lobby of the school and therefore she went to the lobby. Taking advantage of no other persons being present in the school premises accused caught hold the hand of the complainant and he pulled the complainant inside the room of the school. The complainant made an attempt to get herself released from the clutches of accused but at the same time accused pulled her and embraced her to his chest and he put his hand on the breast of the complainant as a result of which, the blouse worn by the complainant was torn out. Thereafter accused was trying to take the complainant inside the room but the complainant shouted for help as a result of which, one Mafabhai Nai who is peon of English School situated adjacent to complainant's school and one Udaygiriji shouted as to what had happened and who was shouting. Thereupon the complainant shouted to rescue her from the clutches of the accused. Thereafter, accused went inside the room of the school and complainant came outside from the school. Those two witnesses i.e. Mafabhai and Udaygiriji enquired from the complainant as to what had happened. Thereupon the complainant narrated the whole incident to the said witnesses.

2.3 Thereafter, accused paid a pay of Rs.325/- to the complainant in the school and after collecting that pay she went to the house of her sister Champaben and she informed Champaben about the incident. Champaben asked the complainant to wait till brother-in-law of the complainant (husband of Champaben) arrives and on arrival of her brother-in-law she was asked to inform him about the incident.

2.4 Thereafter on 8th July 1984 at about 14.00 hours the complainant went to Agathala Police Station and lodged her complaint against the accused. That complaint came to be registered as C.R. No. I 100 of 1984 for an offence punishable under Section 354 of IPC. On the basis of that complaint police case was investigated by police Sub-Inspector and ultimately on completion of the investigation, a charge sheet came to be filed in the Court of the learned Magistrate.

2.5 Thereafter, predecessor of the learned Magistrate who was empowered to try the cases summarily recorded a plea of the accused. The accused pleaded not guilty to the charge. Thereafter the learned Magistrate who delivered a judgement on 20th July 1985, came on transfer

to the Court of JMFC, Deesa, and as she had no powers to try the case summarily, she recorded the plea of the accused at exh.16 and thereafter prosecution examined five witneses on the side of the prosecution and thereafter further statement of the accused was recorded u/s 313 of Cr.P.C. The accused also examined one witness in his defence.

2.6 After hearing the arguments of the learned Advocates for both the parties and after appreciating the evidence led by both the parties, the learned Magistrate was pleased to come to a conclusion that the prosecution has proved the case against the accused for an offence punishable u/s 354 of IPC, beyond reasonable doubt and therefore the learned Magistrate, first passed an order of conviction u/s 255 (2) of Cr.PC and after hearing the learned advocates of both the parties on the point of sentence, the learned Magistrate passed an order of sentence on 20th July 1985 and by that order of sentence accused was sentenced to undergo simple imprisonment of six months and to pay fine of Rs.500/= and in default to undergo further simple imprisonment of seven days. The learned Magistrate had not passed any separate order for an offence punishable u/s 426 of the IPC.

3 Being aggrieved against and dissatisfied with the said judgement Exh.30 dated 20.7.1985 of conviction and sentence rendered by the learned Magistrate in Criminal Case No.1641 of 1984 original accused had preferred Criminal Appeal No.30 of 1985 to the Sessions Court at Palanpur.

4 The learned appellate Judge after hearing the arguments of the learned advocates for both the parties and after perusing the record and proceedings of the case and after reappreciating the evidence led by both the parties in the case before the trial Court, by rendering his judgement Exh.7 dated 18..2.1988 reversed the judgment of conviction and sentence rendered by the learned Magistrate and by allowing the appeal of the original accused, he acquitted the accused for the offences punishable under Sections 356 and 426 of the Indian Penal Code.

5 Being aggrieved against and dissatisfied with the said judgement Exh.7 dated 18.2.1988 rendered by the appellate Judge in Criminal Appeal No.30 of 1985, the original complainant, victim-Bhikhiben Ratilal Joshi first filed one Misc. Criminal Application No.1232 of 1988 u/s 378 (4) of the Criminal Procedure Code, 1973, in

this Court requesting to grant her leave to appeal against the judgement and order of acquittal passed by the learned Joint District Judge and Additional Sessions Judge, Palanpur. It appears from the record that said Misc. Criminal Application was ordered to be converted into Criminal Revision Application No.398 of 1989 and therefore this present Criminal Revision Application filed by the original complainant (victim) is before this Court.

6 I have heard Shri Sameer Bundela, the learned advocate for and on behalf of the learned Senior Advocate Mr P.M. Raval for the Revision-Petitioner and Ms Archana Acharya, the learned Advocate for and on behalf of Mr D.K. Acharya, the learned advocate for the Revision Opponent No.1 and Shri S.T. Mehta, the learned APP for the State i.e. Revision Opponent No.2, in detail at length. I have perused a set of copies of depositions etc supplied by Ms Acharya.

7 Shri Sameer Bundela and Shri S.T. Mehta both have vehemently argued that the learned appellate Judge has seriously erred by not believing the case of the prosecution. They have argued that the learned appellate Judge has not assigned cogent, acceptable and plausible reasons for reversing the finding of conviction and sentence arrived at by the learned Magistrate in Criminal Case No.1641 of 1984. They have also argued that the learned appellate Judge has seriously erred by giving over much importance to the minor discrepancies and minor so called contradictions which he found in the evidence of the witnesses, as narrated by him in his judgement. They have further argued that the learned appellate Judge has not considered the admitted facts for which there was no dispute from the side of the accused. As per their arguments the learned appellate judge ought to have dismissed the appeal preferred by the accused and confirmed the judgement of conviction and sentence rendered by the learned Magistrate.

8 As against the arguments advanced by the original complainant and the learned APP for the State, Ms Acharya has supported the judgement of the appellate Court on the following grounds:-

(i) The complaint is filed late by the complainant and delay caused in lodging the complaint is not properly explained by the prosecution.

(ii) The evidence of the complainant i.e. victim cannot be accepted in view of the major contradictions and omissions and therefore the

learned appellate judge has rightly disbelieved the case of the prosecution.

(iii) There are serious contradictions and omissions in the evidence of Udaygiri PW No.3 and Mafabhai P.W. No.4 who, as alleged by the prosecution, were present in the temple which is admittedly just adjacent to the school in which the incident took place and their evidence is rightly not accepted by the appellate Judge.

By citing the authority of KANAIYALAL ARJANDAS V. TRIBHOVANDAS DEVSHI PANDIT reported in 1997 (4) GCD 172 she has sbumitted that the scope of this Court in revision application is very limited and this revisional Court should not interfere with the finding of the learned appellate Judge in absence of some valid reason to disturb the findings of the appellate Judge.

9. The learned advocates for both the parties have taken me through the evidence of five witnesses examined by the prosecution and evidence of one defence witness examined by the accused. They have also taken me through the further statement of accused recorded u/s 313 of Cr.P.C. Looking to that further statement, accused has completely denied the incident. He has stated that he is innocent and he has nothing to say in connection with the alleged incident.

10. This Court is conscious about the powers which can be exercised under its revisional jurisdiction. The revisional jurisdiction of the High Court while dealing with the order of acuittal passed by the trial Court is more narrow in its scope. It is only in glaring cases of injustice resulting from some violation of fundamental principles of the law that the High Court is empowered to set aside the order of acuittal and direct the retrial of the acquitted accused. It is required to be answered by this Court as to whether appellate Judge has exercised his powers, in accordance with law in deciding appeal. In appeal, the appellate Judge has only to address himself to the question whether the findings of the trial Court are (i) palpably wrong, (ii) manifestly erroneous, or (iii) demonstrably unsustainable and there has been resultant miscarriage of justice. While making scrutiny of the judgement of the appellate Judge, this Court has also taken into consideration the judgement of the trial Court. The learned Judge of the trial Court who recorded the evidence of the witneses before his own eyes analysed and appreicated the evidence and came to a conclusion that the prosecution has proved the case against the accused for offences punishable u/s 354 and 426 of IPC.

The learned Magistrate sentenced the accused only for an offence punishable u/s 354 of IPC and no separate sentence has been imposed upon the accused for an offence punishable u/s 426 of IPC. If we read the judgement of the Appellate Judge, we find that the learned Appellate Judge has not come to the conclusion that the conclusion based on the facts recorded by the learned Magistrate is wholly unreasonable so as to be liable to be chararacterised as perverse and there has been resultant miscarriage of justice. For the Appellate Judge he has to see and evaluate the evidence and then come to the conclusion that the finding of fact arrived at by the trial Court is not probable and in no case accused can be convicted. Instead of this, the learned appellate Judge appreciated the evidence afresh and found that there are some discrepancies and contradictions in the evidence of the witnesses and therefore he was pleased to come to a conclusion that the case against the accused is not proved beyond reasonable doubt and on arrival of such conclusion, he allowed the appeal and acuitted the accused.

11 From the judgement of the appellate Judge, it appears that the learned appellate Judge has not kept in mind the well settled principles of law with regard to appreciation of evidence.

11.1 In case of INDER SINGH AND ANOTHER V/S STATE (DELHI ADMINISTRATION) reported in AIR 1978 SC 1091 the Hon'ble Supreme Court has observed on page 1092 as under:-

> "2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is, too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police

presentation of fool-proof concoction. Why fake up ? Because the court asks for manufacture to make truth look true ? No, we must be realistic.

3. We are satisfied that the broad features of the case, the general trend of the testimony and the convincing array of facts which are indisputable, converge to the only conclusion that may be reasonably drawn, namely, that the accused are guilty. Theoretical possibilities may not shake up, fancied weaknesses may not defeat, when verdicts are rested on sure foundations. Stray chances of innocence haunting the corridors of the court cannot topple concurrent findings of guilt."

11.2 In another case of State of Uttar Pradesh v. Anil Singh AIR 1988 SC 1998 it has been observed by the HOn'ble Apex Court in paragraphs 14 and 15 on page 2002 as follows:-

"14. In Abdul Gani v. State of Madhya Pradesh, AIR 1954 SC 31 Mahajan, J., speaking for this Court deprecated the tendency of courts to take an easy course of holding the evidence discrepant and discarding the whole case as untrue. The learned Judge said that the courts should make an effort to disengage the truth from falsehood and to sift the grain from the chaff.

15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

12. The learned Appellate Judge decided Criminal Appeal No.30 of 1995 on 18.2.1988. It appears that the learned appellate Judge has not come across the

guidelines given by the Hon'ble Supreme Court with regard to discrepancies, contradictions, etc. given in case of BHARWADA BHOGINBHAI HIRJIBHAI Vs. STATE OF GUJARAT reported in AIR 1983 SC 753. It has been held in this case that over much importance cannot be given to minor disccrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

13 In aforesaid very case of Bharwada Bhoginbhai Hirjibhai (supra) the guidelines are given by the Honourable Supreme Court for assessing the evidence of the woman victim who complains of rape or sexual molestation. It has been held in para 10 on page 757 as follows:-

"By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because:

(1) A girl or a woman in the tradition bound nonpermissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial

home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

The Honourable Supreme Court has therefore held in para 11 as follows:-

"We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors

does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming."

14 It appears that the learned Appellate Judge while appreciating the evidence of Bhikhiben (victim) did not keep in mind the above legal position with regard to the appreciation of evidence of female victim in cases of sexual molestation.

15 The learned Magistrate who recorded evidence of prosecution-witnesses before his eyes had a chance to observe the manner in which their evidence is given. In case of MADHUSUDAN DAS V. SMT NARAYANI BAI and Ors. reported in AIR 1983 SC 114 it has been observed by Hon'ble Supreme Court in para 8 (page 116) as follows:-

"..... At this stage, it would be right to refer to the general principle that in an appeal .... when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail, unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial Court or there is sufficient balance of improbability to displace its opinion as to where the credibility lies."

It appears that the learend Appellate Judge did not keep in mind the above legal position while dislodging the case of prosecution which only rests on oral evidence.

16 When the learned Magistrate appreciated the evidence of prosecution, he objectively analysed and appreciated the evidence of prosecution witnesses. What is appreciation of evidence? The process of appraising the evidence led by two parties can be equated almost to the process of holding the balance - the time honoured symbol of justice. Sometime when the two pans of balance

are seemingly equal, even a slight evidence circumstantial or otherwise, tilts the balance of one side and thereby probablise the case of one party as against the other. In this process of holding the balance what pieces of evidence, of course excluding inadmissible evidence would lean the balance in favour of one party is dependent on the evidence available in a given case.

17 The learned Appellate Judge ought not have disturbed the findings of the learned Magistrate merely because there are minor and unimportant contradictions in the evidence of the complainant. When the learned Magistrate has analysed and appreciated the evidence of the complainant-lady and witnesses then there was a little scope for the Appellate Judge to come to a different conclusion by giving more emphasis of minor and trivial contradictions.

18 The prosecution has examined Bhikhiben Ratilal Joshi as PW No.1 at Exh.7. To appreciate her evidence, following admitted facts are required to be kept in mind:-

(1) The incident took place on 7.7.1984 at about 10.20 hours. She lodged her complaint after approval of her brother-in-law (sister's husband) who had gone outside from the village. Her deposition was recorded 1.1.1985 that means about five months after the date of the incident.

(2) She is unmarried woman aged about 21 years on the date of the deposition.

(3) She resides with her sister in a village for the purpose of service in school.

(4) She hails from a small village Rampura of Deesa Taluka of Banaskantha District.

(5) There is no defence from the accused side that on the day of the incident either complainant or the accused-Head Master was absent in the school. Presence of both the complainant and accused in the school during the morning school working hours is not under the challenge.

(6) Admittedly, there is no case of accused that there was enmity in between himself and the complainant-victim.

(7) On reading further statement of the accused, we find that the accused has not advanced any case as to why the complainant lodged a complaint against him and deposed against him in the Court levelling charge of serious offence punishable u/s 354 of IPC, which will adversely affect her character.

19 Looking to a young age of the complainant who is unmarried and who resides with her sister and sister's husband only for the purpose of serving in the school, she will not depose against the accused so as to invite an adverse effect on her character.No lady would involve herself in such type of case because after all it will affect adversely against her reputation. When we talk of Gender Justice we should keep in mind that in our Indian Culture an unmarried woman will not falsely implicate any accused inviting an adverse effect against her character as a result of which her matrimonial prospects would be jeopardised. Shr S.T. Mehta the learned APP for the State has argued that a lady who is residing in village may not be in a position to state the events in a chronological order of time, properly. If such type of lady gives evidence in the Court after about five months, some minor contradictions and discrepancies would naturally appear in her evidence. If a witness gives evidence exactly verbatim as per his complaint, then, it would be argued that this witness is tutored one and has deposed like a parrot before the Court. Under the circumstances, this type of trivial discrepancies and minor contradictions will suggest that the deposition of victim is natural one. It is not always in all cases that corroboration should be there from other independent witnesses, when a victim gives her evidence inviting adverse effect against her own character and reputation. He has argued that hte learned Appellate Judge has not appreciated the evidence of the victim in a manner in which it ought to have been appreciated keeping in mind the above admitted facts. Shri S.T. Mehta has further argued that here in this case there is an ample evidence corroborating the evidence of the complainant. Immediately after an attempt of assault is made by using criminal force by the accused on the victim with an intent to outrage her modesty, she shouted for help. Admittedly, one temple of Lord Shankar is situated opposite to the primary school wherein accused and complainant are serving. As per the evidence, two witnessses were present in the said temple. PW No.3 Udaygiri and PW No.4 Mafabhai were sitting on the otta of the temple and at about 10.15 or 10.30 AM both these

witnesses heard shouts of the victim and they saw the frightened complainant-Bhikhiben coming out from the school. She narrated the incident to these two witnesses and therefore evidence of these two witnesses is relevant u/s 6 of the Indian Evidence Act as also u/s 157 of the Indian Evidence Act. They inquired from victim as to what had happened and she narrated the incident in her own language. The learned Appellate judge has put much emphasis on the deposition of these two witnesses who have deposed about the facts stated to them by the victim. As per the case of the prosecution, the victim was standing in lobby. On that day she had to collect her pay from the school. Accused who being a Head Master had previously asked her to come to him to collect pay after school hours were over. At about 10.20 AM after the school hours of morning shift were over, she went to accused and asked him to give her pay. Thereupon accused again told her to wait till other male/female teachers leave the school and therefore she was standing in osri. Thereafter, when accused asked her to come to him to collect the pay she went there and the accused taking an advantage of absence of any other third person immediately caught hold of the hand from wrist of the victim and pulled her towards him and tried to push her into the room of the school. As per her complaint, she got her hand released from the clutches of the accused but in the meantime accused pulled her and embraced her and put his hand on her breast and in that scuffle her blouse was torn out.

20 Now if she had to narrate this incident to some other persons she would not say exactly as to what had happened because she would feel shy. And in a guarded manner she would narrate the incident. But one thing is certain that both the witnesses had seen that the blouse of the victim was torn out on the right side. Therefore, when victim narrated the incident immediately after the incident which took place, the evidence of witnesses who were sitting on the otta becomes relevant and their evidence gives full corroboration to the say of the victim. If we read the cross-examination of these two witnesses, their presence at the otta of the temple is not disputed. No case is put in cross-examination by the accused as to why these two witnesses have deposed against him. Therefore, when these two witnesses who were present on otta of temple, just opposite to primary school in which the complainant was serving and when they heard shouts and they also saw the frightened complainant coming out from the school and when she narrated the incident in her own language to these witnesses then that evidence of two witnesses clearly suggests that the

prosecution has led ample evidence against the accused. The learned Appellate Judge has put much emphasis on minor and small contradictions here and there in the evidence of the complainant. The learned Appellate judge ought to have kept in mind that the prosecution has not to prove the case event by event separately. The Appellate Judge ought to have appreciated the evidence of the witnesses examined as a whole and no attempt should be made to take some words from the evidence here and there of these witnesses to compare the evidence with regard to that words spoken by the other witnesses. He is supposed to appreciate the evidence as a whole and he has not to dissect the evidence only with a view that the benefit of doubt is to be given to the accused. There are certain principles for giving the benefit of doubt. In case of H.P. ADMINISTRATION VS. OMPRAKASH reported in AIR 1972 SC 975 the Hon'ble Supreme Court has held as follows:-

> "The benefit of doubt to which the accused is entitled is reasonable doubt - the doubt which rational thinking man will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy though unwittingly it may be, or is afraisd of the logical consequences, if the benefit was not given. It is not the doubt of vacillating mind that has not the moral courage to decide, but shelters itself in a vain and idle septicism. It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. The mere fact that there is only remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt."

21 Ms Acharya has argued that the incident occurred in the morning hours on 7th July 1984 and the complainant lodged her complaint in Agathala Police Station at 14 hours on 8th July 1984 and therefore there is a delay of about 26-27 hours and for this delay the prosecution has not explained as to why delay has occurred. Admittedly, the complainant is an unmarried woman. She is not residing with her parents and that for service purpose she was residing with her sister and sister's husband in the village. On that day, husband of her sister had gone outside from the village and therefore naturally in this type of cases she would think twice as to what result would come if she would lodge the complaint. She has explained that in the night time, her sister's husband

came and on arrival of sister's husband in the night time she narrated the incident and thereafter on the next day she lodged the complaint.

22 Shri S.T. Mehta has argued that the incident took place in the month of July and monsoon might have set in and probably because of rains she would have left her village to go to Agathala after about 12.00 noon of the next day. Looking to the facts and circumstances the prosecution has tried to explain the delay. There is no plausible reason to disbelieve the case advanced for explaining the delay and therefore the learned appellate Judge was in error to put much stress on this trivial reason of delay in lodging the complaint.

23 Ms Acharya has further argued that looking to the evidence of the complainant there were enimical relations betweent the accused and the complainant's sister's husband and therefore she has lodged a false complaint. If, really, the husband of the victim's sister wanted to involve the complainant, the victim would not come forward to lodge such type of complaint which may adversely affect her reputation. In that type of case, her sister's husband would have projected his own wife (sister of the victim) for such type of case and therefore merely because there were some enimical relation in between the accused and husband of sister of the victim, it cannot be inferred and concluded that victim lodged a false complaint against the accused.

24 As stated earlier, Ms Acharya has taken this Court through the entire evidence of the prosecution together with further statement of the accused. Even thereafter this Court has perused the evidence in between the lines. It appears prima facie that the learned Appellate Judge has brushed aside the evidence of the victim on flimsy grounds. To discard the evidence of victim, no cogent and substantial reasons are given. As stated earlier, when the learned Magistrate of the trial Court who recorded the evidence of the witnesses before her own eyes and the learned Judge of the trial Court had noticed the demeanour of the witnesses then, the learned appellate Judge should be slow to interfere with the reasons recorded by the learned Magistrate. It is very easy to find fault with the appreciation of the evidence made by the learned Magistrate. This Court has read the judgement of the trial Court also. The learned Appellate Judge has not assigned any acceptable reason to throw away the judgement of the trial Court. Under the circumstances, this is a fit case in which it can be said that the approach of the learned Appellate Judge for

appreciating the evidence was perverse and contrary to settled principles of law for appreciation of evidence and therefore this Court finds that this is a fit case in which finding arrived at by the appellate Judge is required to be set aside.

25 On query being made by this Court, Shri S.T. Mehta, the learned APP has argued that in this type of criminal revision application if this Court reverses the judgement of the lower appellate Court particularly in Criminal Revision Application, this Court has two options one to remand the case to the trial Court for retrial and other to remand the appeal to the appellate Court for rehearing of the appeal. For this he has cited one authority of K. Chinnaswamy Reddy v. State of Andhra Praedesh reported in AIR 1962 SC 1788 wherein it has been held in para 11 as follows:-

"11. The next question is what order should be passed in a case like the present. The High Court also considered this aspect of the matter. Two contingencies arise in such a case. In the first place there may be an acquittal by the trial court. In such a case if the High Court is justified, on principles we have enunciated above, to interfere with the order of acquittal in revision, the only course open to it is to set aside the acquittal and send the case back to the trial court for retrial. But there may be another type of case, namely, where the trial court has convicted the accused while the appeal court has acquitted him. In such a case if the conclusion of the High Court is that the order of the appeal court must be set aside, the question is whether the appeal court should be ordered to re-hear the appeal after admitting the statement it had ruled out or whether there should necessarily be a retrial. So far asthis is concerned, we are of opinion that it in open to the High Court to take either of the two courses. It may order a retrial or it may order the appeal court to re-hear the appeal. It will depend upon the facts of each case whether the High Court would order the appeal court to re-hear the appeal or would order a retrial by the trial court. Where, as in this case, the entire evidence is there and it was the appeal court which ruled out the evidence that had been admitted by the trial court, the proper course in our opinion is to send back the appeal for rehearing to the appeal court. In such a case

> the order of the trial court would stand subject to the decision of the appeal court on re-hearing. In the present case it is not disputed that the entire evidence has been led and the only defect is that the appeal court wrongly ruled out evidence which was admitted by the trial court. In the circumstances we are of opinion that the proper course is to direct the appeal court to re-hear the appeal and either maintain the conviction after taking into consideration the evidence which was ruled out by it previously or to acquit the accused if that is the just course to take. We should like to add that the appeal court when it re-hears the appeal should not be influenced by any observations of the High Court on the appreciation of the evidence and should bring to bear its own mind on the evidence after taking into consideration that part of the evidence which was, considered inadmissible previously by it. We therefore allow the appeal subject to the modification indicated above."

26 Looking to the above legal position with regard to such Criminal Revision Application in which this Court disturbs the findings of the appellate Court and looking to the facts and circumstances of this case in which the appellate Judge has appreciated the evidence in the manner unknown to settled principles of law with regard to appreciation of evidence, this Court deems it fit, just and proper to remand the appeal to the learned appellate Judge with a direction to rehear the appeal by affording full opportunity of being heard to both the parties including the original complainant also. Accordingly, this Criminal Revision Application filed by the original complainant-victim Bhikhiben is allowed and the judgement exh.7 dated 18.2.1988 of the Joint District Judge and Additional Sessions Judge, Palanpur, rendered in Criminal Appeal No.30 of 1985 is set aside. It is further ordered by this Court that the learned Sessions Judge of Banaskantha District at Palanpur shall hear Criminal Appeal No.30 of 1985 afresh by affording full opportunity of being heard to all the parties including the complainant - victim afresh and decide that appeal within 3 months from the date of this order without being influenced any way by the observations and findings made by this Court in this judgement. Rule is made absolute in terms of the above order.

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(mohd)